United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

74-1344

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,
Plaintiff-Appellee,

against

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,
Defendant and Third-Party Plaintiff-Appellee,

and

CIA DE NAV. MAR. NETUMAR,
Defendant and Third-Party Plaintiff-Appellant,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH A SUGGESTION FOR A HEARING EN BANC

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PETITION FOR REHEARING WITH A SUGGESTION FOR A HEARING EN BANC

The appellant shipowner seeks a rehearing because the Court has overlooked and misapprehended both points of law and points of fact in arriving at its decision on the appeal herein.

POINT I

The jury verdict cannot be sustained on the basis of overloading because the Trial Court did not charge on this issue and it admittedly was not an issue submitted to the jury.

In substance the Court has held that the jury could have found that the plaintiff's accident was caused by the overloading of a pipe crib or bed, that the shipowner was negligent in ordering too much pipe to be loaded at #1 hatch, and that the shipowner failed to give the stowage operation the necessary supervision so that the pipe bed in question was not overloaded.

In *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 369 (1962), while the Court did hold that where there was a view of the case that made the jury's answers to special interrogatories consistent they must be resolved that way, it made it abundantly clear that it was only those grounds which were submitted to the jury under a proper charge that could be consistent. It said at page 364:

> "So far as we know the jury may have found respondents liable not on either of those two grounds, but solely on a third, namely, because of defective bands—*a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so.*" (Emphasis supplied)

In support of this proposition, it cited *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 536. In that case the United States Supreme Court was quite explicit that a jury verdict is not dispositive of any issue which is not submitted to it under appropriate instructions and that it is reversible error for a court so to interpret a jury verdict.

That overloading was not an issue before the jury is not open to question. In the course of the argument of this appeal the Court asked counsel for plaintiff whether overloading was an issue which was submitted to the jury and whether in his summation overloading had been argued. Counsel for plaintiff responded unequivocally in the negative. This can be verified by consulting the tapes on which the argument was recorded, and appellant respectfully directs the Court's attention thereto. Furthermore, since this is a highly extraordinary situation and further proceedings may be necessary, it is respectfully submitted that a transcript be made of this portion of the argument and that it be made a part of the record in this case. In order to save the time and expense to the Court, the appellant shipowner is agreeable to paying for the cost of transcribing the tapes or portions thereof and would be willing to have them transcribed by an outside agency designated by and acceptable to the Court.

It does appear to be significant that, in denying the post-trial motions of the appellant shipowner to set aside the jury verdict, the trial judge totally rejected overloading as a basis on which to sustain the jury verdict (457a-460a). This was done notwithstanding the fact that the opposing papers had urged denial of the motion on the ground of overloading. (Documents 53-58).

Thus, to hold as the Court did under these circumstances that the jury verdict nonetheless could be sustained on the basis of overloading, is to hold that a jury verdict may be

sustained on any ground without regard to whether it involves an issue which is submitted to the jury or not and whether the jury is charged on such issue or not or for that matter whether it ever was intended as an issue.

The Seventh Amendment does state that no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of common law. Neither the Seventh Amendment nor the rules of common law, however, say that once a jury renders a verdict, it must be sustained on any ground whether it is submitted to the jury or not and no decision has so interpreted it.

It is clear from the record that overloading not only was not an issue in the case, but that it was improper to sustain the jury verdict on such a ground.

POINT II

The law which the Court applied in reaching its decision has been repeatedly rejected by the United States Supreme Court.

In determining that there was no inconsistency between the finding that the vessel was not unseaworthy and the finding that the accident was caused by negligence of the shipowner, this Court has evolved a new and restricted concept of unseaworthiness liability. The effect of this holding is that an isolated act of negligence on the part of the ship's crew no longer renders a vessel unseaworthy. Such a distinction has been repeatedly rejected by the United States Supreme Court in *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, and on through *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Waldron* v. *Moore-McCormack Lines*, 386 U.S. 724; and even *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, on which this Court relies for its restriction. In *Mahnich* v. *Southern S.S. Co.*, *supra*, in rejecting the shipowner's contention that the vessel was not unseaworthy

because the mate and boatswain were negligent in selecting and rigging a staging with defective rope, the Court said at page 103:

> "Any negligence of the mate in selecting the rope and ordering its use as part of the staging, or of the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging."

In *Waldron* v. *Moore-McCormack Lines*, 386 U.S. 724, in rejecting the shipowner's contention that a vessel was not unseaworthy when a competent mate did not assign a sufficient number of men to perform a particular task, the Court said at pages 726-727:

> "And in *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 3 L. ed. 2d 413, 79 S.Ct. 445, 15 NCCA 3d 265, we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy."

In *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, the Court said at page 499:

> "A vessel's condition of unseaworthines might arise from a number of circumstances. * * *. The method of loading her cargo, or the manner of its stowage might be improper. * * *. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service."

Actually in the *Usner* case in holding that the vessel was not unseaworthy under the facts of that case, the United States Supreme Court appears to have rejected rather than permitted the very distinction which this Court has

made. At page 500 it said:

> "What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman."

Thus to say as this Court appears to do that there can be no liability for unseaworthiness if an accident results from an isolated act of negligence of the shipowner, obviously is not only not correct, but has been repeatedly rejected by the United States Supreme Court.

In its decision, this Court also stated:

> "For some reason which is not to clear to us, the shipowner seems to think that 'inaction' by the shipowner could not possibly constitute negligence." (Slip opinion p. 681).

No such claim was made or intended. A review of the briefs will disclose that this contention was directed only to conduct sufficient to defeat indemnity as it has been defined by the Courts and not negligence which is inappropriate in the area of indemnity. *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563, 569.

POINT III

Some of the findings made by the Court are clearly unsupported by and are contrary to the record.

In its opinion the Court states with respect to the loading of pipes above the tops of the uprights:

> "There is expert testimony that this is bad practice."

There is no such testimony in the record. Wheeler, the ITO expert, in fact testified that it was good practice (360a).

His only objection was that the pipes could not be laid above the upright near the uprights because they would fall off (342a) and because a level surface was needed in order to rest the catwalk which was to be constructed so that the crew could walk forward and aft on the ship (360a). Ratliff, the hatch boss, objected to loading above the top of the uprights because the pipe would roll out of the bed (118a). White, the marine carpenter's expert, was not asked his opinion and gave none either way (259a-303a). Montella was not even permitted to testify whether the pipe bed would hold pipe loaded above the uprights, on the ground that there was no such testimony in the case (257a).

The Court further stated:

> "There is no evidence from Piper or any other witness that he had given any information about the pipes, correct or incorrect, to the stevedore."

It was undisputed that while the Port Captain in conjunction with the Master and Chief Officer of the vessel drew up and approved the proposed stowage, it was subject to the approval of the stevedore (173a).

The Court also critized Port Captain Piper because he was not present aboard the vessel for the purpose of supervising the loading and stowing operations. The testimony was undisputed that it was the stevedore who was responsible for the manner of getting the cargo aboard and loading it aboard the ship, and for providing the necessary supervision (388a-390a). The shipowner's supervision was concerned with shipboard stability and contamination of one cargo with the other (388a-389a).

CONCLUSION

The petition for rehearing should be granted and the relief heretofore prayed for be granted, or in the alternative that this matter be heard en banc.

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
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UNITED STATES COURT OF APPEALS
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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 24th day of December, 1974, he served two copies of the Petition for Rehearing on See attached list the attorneys for the see attached list by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. See attached list ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

24th day of December, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-[illegible]
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Commission Expires March 30, 1976

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